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FILED

MAY 18 2001

CLERK

No. 00-1505

IN THE

Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,

Petitioner,

v.

PATRICIA HEATON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS AND STATE OF GEORGIA DEPARTMENT OF BANKING AND FINANCE IN SUPPORT OF PETITIONER

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Balmar Legal Publishing Services, Washington, DC 202-682-9800

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BRIEF OF *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS AND STATE OF GEORGIA DEPARTMENT OF BANKING AND FINANCE IN SUPPORT OF PETITIONER

Amici Curiae Conference of State Bank Supervisors ("CSBS") and State of Georgia Department of Banking and Finance ("Georgia Department") respectfully submit this brief in support of Petitioner, Monogram Credit Card Bank of Georgia ("Monogram").[1]

INTEREST OF AMICI CURIAE

CSBS is the professional association of state officials responsible for chartering, regulating and supervising nearly 7,000 state-chartered banks and over 400 state-licensed branches and agencies of foreign banks. Since 1902, CSBS has been the primary national representative and advocate for the state banking system, and CSBS has often participated in cases raising important issues for state banks and state bank regulators.

The Georgia Department is the agency responsible for administering the banking laws of the State of Georgia, including provisions dealing with the chartering and regulation of Georgia state banks. The Georgia Department has a direct supervisory interest in this case, because it granted a state bank charter to Monogram on February 16, 1988, and this case arose out of credit card transactions between Monogram and Respondent, Patricia Heaton, a resident of Louisiana ("Heaton").

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Amici have significant concerns about the Fifth Circuit's decision in this case. As explained in the petition (*see* Pet. 6-8), the Fifth Circuit declined to overturn a district court order that remanded this case to state court for lack of federal jurisdiction. The Fifth Circuit thereby failed to correct a clearly erroneous holding of the district court on an issue of great importance to the state banking system. More specifically, the district court refused to defer to an expert determination of the Federal Deposit Insurance Corporation ("FDIC") and instead held that Monogram is not a "State bank" under the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* ("FDIA").

As explained below, the district court's ruling threatens to undermine, with respect to state-chartered credit card banks, the competitive equality that Congress has established between state banks and national banks in the charging of interest rates on loans. In addition, the district court's ruling calls into question the ability of bank regulators, bank officials and bank customers to rely on the FDIC's approval of deposit insurance for state-chartered credit card banks and similar special-purpose depository institutions. As a result, the district court's ruling threatens to disrupt, as to such institutions, the carefully balanced system of federal and state regulation that Congress has mandated under the FDIA. *Amici* therefore strongly support Monogram's efforts to obtain review by this Court of the Fifth Circuit's decision. *Amici* share Monogram's view that the Fifth Circuit should have exercised appellate jurisdiction for the purpose of correcting the district court's misguided construction of the FDIA.

REASONS FOR GRANTING THE PETITION

I. The Significance of the Underlying District Court Order, Which the Fifth Circuit Improperly Insulated from Appellate Review, Strongly Weighs in Favor of Granting the Petition.

For the reasons set forth in the petition, *amici* agree with Monogram that the Fifth Circuit's interpretation of 28 U.S.C. § 1447(d) conflicts with decisions of several other circuits and should be reviewed by this Court. As explained below, *amici* also agree that the national significance of the district court's underlying remand order provides a compelling reason for this Court to review the Fifth Circuit's decision.

Section 27 of the FDIA, 12 U.S.C. § 1831d(a), permits a "State bank" to rely on the laws of its home state in charging "interest" (including late fees) on loans made to out-of-state residents.[2] It is undisputed that Monogram assessed late fees on its credit card loans to Heaton in accordance with the laws of Georgia, Monogram's home state. Accordingly, Monogram's late fees were lawful under Section 27 and were immune from challenge under Louisiana law if Monogram qualified as a "State bank" under the FDIA. *See* Pet. 4-5.

The district court held that Monogram did *not* qualify as a "State bank" under the FDIA, because Monogram accepted deposits from its parent company but not from the general public. The district court declared that Monogram was not "engaged in the business of receiving deposits, other than trust funds" and, therefore, could not be a "State bank" under the FDIA. *See* Pet. App. 20a-22a; 12 U.S.C. §§ 1813(a)(2), (c)(2) & (c)(5); *id.* § 1815(a)(1). Consequently, the district

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[2] *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993). *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (upholding the authority of a national bank, under 12 U.S.C. § 85, to charge "interest" (including late fees) permitted by the laws of its home state on loans made to residents of other states).

court held that Section 27 did not preempt Heaton's claims against Monogram under Louisiana's Consumer Credit Law, and that the case should be remanded to state court for lack of federal jurisdiction. *See* Pet. App. 20a-22a; 12 U.S.C. § 1831d(a).

In holding that Monogram was not a "State bank" under the FDIA, the district court refused to defer to the FDIC's consistent position that Monogram has been a "State bank" eligible for deposit insurance ever since Monogram received its state bank charter in 1988. Indeed, during the district court proceedings, the FDIC submitted a letter confirming Monogram's status as an FDIC-insured "State bank." *See* Pet. App. 2a-3a. Subsequently, the FDIC's Board of Directors approved the publication of an opinion of its General Counsel, stating that (i) state-chartered banks similar to Monogram qualify as "State banks" eligible for deposit insurance under the FDIA, even if they accept deposits only from affiliates and not from the general public, and (ii) the district court's contrary interpretation of the FDIA was "irrational."[3]

The FDIC General Counsel's opinion pointed out that the district court's interpretation of the meaning of "State bank" was contrary to an earlier decision of the Second Circuit Court of Appeals.[4] The opinion also observed that the

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[3] FDIC General Counsel's Opinion No. 12, 65 Fed. Reg. 14,568, 14,571 (2000). The FDIC has recently published notice of a proposed regulation that would incorporate the legal position set forth in its General Counsel's Opinion No. 12. *See* FDIC Notice of Proposed Rulemaking, "Being Engaged in the Business of Receiving Deposits Other Than Trust Funds," 66 Fed. Reg. 20,102 (2001).

[4] *See* FDIC General Counsel's Opinion No. 12, *supra* note 3, at 14,570, citing *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995). In *Meriden Trust*, the Second Circuit held that a state-chartered bank was a "State bank" and an "insured depository institution" under the FDIA, even though the bank held only two FDIC-insured deposits (both of which were owned by affiliates) and engaged solely in a trust business. *See* 62 F.3d at 451-54.

district court's ruling could "lead to the existence of State depository institutions that are insured by the FDIC but unregulated by every section of the [FDIA]."[5] The FDIC had previously warned the district court that its ruling as to Monogram "may affect hundreds of similarly situated FDIC-insured institutions processing billions of dollars in transactions."[6]

The Fifth Circuit acknowledged that "the merits of this case present significant questions of law concerning the interpretation of the FDIA and the ability of the courts to 'second-guess' the FDIC's determinations about whether financial institutions are 'state banks' under the FDIA." Pet. App. 11a. However, based on its erroneous construction of 28 U.S.C. § 1447(d), the Fifth Circuit declined to address these crucial issues under the FDIA and dismissed Monogram's appeal. Following the Fifth Circuit's decision, the district court denied the FDIC's motion to intervene as a party defendant and again issued an order remanding the case to state court. In its second remand order, the district court expressly *reaffirmed* its conclusion that Monogram is not a "State bank" under the FDIA.[7]

Both courts below stated that the district court's construction of the FDIA would have "no preclusive effect" on subsequent state court proceedings.[8] Nevertheless, the district court's twice-articulated interpretation of "State bank"

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[5] *See* FDIC General Counsel's Opinion No. 12, *supra* note 3, at 14,571.

[6] Memorandum of Points and Authorities in Support of the Federal Deposit Insurance Corporation's Motion for Leave to Intervene as a Party Defendant, at 4 (filed with the district court on Nov. 22, 1999), *quoted in* Pet. 10.

[7] *Heaton v. Monogram Credit Card Bank of Georgia*, 2001 WL 15635, at *1-*3 (E.D.La., Jan. 5, 2001).

[8] *See id.* at *3 n.3 (district court's remand order); Pet. App. 11a (Fifth Circuit's decision dismissing Monogram's appeal).

under the FDIA is likely to create substantial uncertainty and confusion within the state banking system.[9] The district court's orders have already received extensive coverage in the national financial press.[10] As shown below, the district court's unfounded construction of the FDIA poses a serious challenge to the vitality of core congressional policies inherent in the FDIA. Accordingly, there is a compelling reason for this Court to review and overturn the Fifth Circuit's decision, thereby permitting Monogram to obtain federal appellate review of the district court's ruling.

II. Federal Appellate Review of the District Court's Ruling Is Urgently Needed, Because That Ruling Threatens to Undermine Important Congressional Policies Embodied in the Federal Deposit Insurance Act.

For three reasons, the district court's interpretation of "State bank" does violence to fundamental principles of the FDIA. First, the ruling would destroy, with respect to state-chartered credit card banks, the competitive parity that Congress has mandated in the charging of "interest" on loans by national banks and FDIC-insured state banks. Second, the ruling rejects the FDIC's determination of a state bank's qualification for deposit insurance and, in so doing, ignores the FDIA's prescribed procedures for revoking the insured status of a state bank. Third, the ruling threatens to disrupt

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[9] *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,104-05 (expressing the FDIC's view that the "uncertainty" created by the district court's ruling "could produce irrational and harmful results").

[10] *See, e.g.*, Rob Garver, "FDIC Warns of Litigation Flood as Case Proceeds Challenging Card Bank Status," American Banker, Jan. 3, 2000, at 1; R. Christian Bruce, "Fifth Circuit Dismisses Appeal in Case That Could Have Clarified Late Charges," 75 BNA's Banking Report 629 (Nov. 13, 2000); Paul Beckett, "Clashing Interest: Why Patricia Heaton Could Cause Problems For a GE-Owned Bank," Wall Street Journal, Mar. 30, 2001, at A1; Rob Blackwell, "To Quell Lawsuit, FDIC Offers Clearer State Bank Definition," American Banker, April 11, 2001, at 1.

the FDIA's carefully-wrought system of dual state and federal regulation for FDIC-insured state banks.

1. Section 27 of the FDIA was enacted in 1980 to remove the competitive inequality that previously existed between state banks and national banks in the charging of "interest" on loans. Under 12 U.S.C. § 85, a national bank may charge interest either (i) at the annual rate of one percent over the applicable Federal Reserve discount rate on 90-day commercial paper, or (ii) at the highest rate permitted to the "most favored lender" under the laws of the state where the national bank is located. In addition, under the "exportation" doctrine, Section 85 allows a national bank to charge "interest" permitted by the laws of its home state to borrowers residing in other states.[11] In *Smiley, supra,* this Court held that the term "interest" in Section 85 includes late fees charged on credit card loans – the same type of fees that are the subject of Heaton's lawsuit against Monogram.

Until 1980, state banks were at a significant competitive disadvantage in making loans, because they did not have interest-charging powers comparable to those granted by Section 85 to national banks. Congress adopted Section 27 of the FDIA for the specific purpose of establishing competitive equality between national banks and FDIC-insured state banks in the charging of "interest" on loans.[12] Section 27 expressly declares that its purpose is "to prevent discrimination against State-chartered insured depository institutions," and Section 27 grants to such institutions the same rights to charge interest that national banks enjoy under Section 85. *See* 12 U.S.C. § 1831d(a). The legislative history

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[11] *See Smiley,* 517 U.S. at 737, 744 (discussing "exportation" power granted to national banks under Section 85); *Marquette National Bank v. First of Omaha Service Corp.,* 439 U.S. 299, 308-19 (1978) (same, and also explaining the "most favored lender" status enjoyed by national banks under Section 85, *see id.* at 314 n.26).

[12] *See Greenwood Trust,* 971 F.2d at 826-27; *Hill v. Chemical Bank,* 799 F. Supp. 948, 951-52 (D. Minn. 1992).

of Section 27 confirms that the statute was intended to establish "parity, or competitive equality" between national banks and FDIC-insured state banks with respect to their ability to charge "interest."[13] Federal and state courts have subsequently held that Section 27, like Section 85, permits a covered bank to rely on the laws of its home state in charging late fees on credit card loans made to out-of-state residents.[14]

Only "State banks" and other "insured depository institutions" are entitled to exercise the interest-charging powers granted under Section 27. In contrast, Section 85 applies to *all* national banks, regardless of their status as FDIC-insured institutions. Thus, a national credit card bank is *not* required to maintain federal deposit insurance in order to charge "interest" (including late fees) based on its home state laws for loans made to out-of-state customers.

The district court's ruling that Monogram is not a "State bank" under the FDIA would strip Monogram – and, by logical extension, all similar state-chartered credit card banks – of their ability to rely on Section 27. Accordingly, the district court's erroneous interpretation of the FDIA could destroy competitive parity among state and national credit card banks and greatly erode the value of a state charter for such banks. State-chartered credit card banks would confront powerful economic and operational incentives to convert to national bank charters in order to retain their interest-charging powers under federal law. Such a result would undermine the dual chartering and regulatory system for credit card banks,

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[13] *See, e.g.*, 126 Cong. Rec. 6900 (1980) (remarks of Sen. Proxmire, Senate floor manager for the 1980 legislation); *id.* at 6907 (remarks of Sen. Bumpers).

[14] *See Greenwood Trust*, 971 F.2d at 829-31; *Hill*, 799 F. Supp. at 952-53; *Hunter v. Greenwood Trust Co.*, 640 A.2d 855 (N.J. App. 1994); *reversed*, 668 A.2d 1067 (N.J. 1995), *reinstated*, 679 A.2d 653 (N.J. 1996).

thereby frustrating the manifest intent of Congress in adopting Section 27.[15]

2. In holding that Monogram was not a "State bank," the district court improperly refused to follow the FDIC's determination that Monogram satisfied the statutory criteria for "State bank" status under the FDIA. The FDIC's position, as subsequently explained in its General Counsel's Opinion No. 12, was entitled to judicial deference because it reflected the long-established and consistent practice of the agency in interpreting the statute it is charged to administer.[16]

The district court committed an even more serious error by allowing a private litigant to attack Monogram's status as a "State bank" without following the prescribed administrative procedures for terminating the deposit insurance of a state bank. By asserting that Monogram could not qualify as a "State bank" under the FDIA, Heaton effectively challenged Monogram's eligibility for deposit insurance. The FDIA provides that a state-chartered bank may *not* be treated as a "State bank" *or* as an "insured depository institution" *unless* it is "engaged in the business of receiving deposits, other than trust funds." *See* 12 U.S.C. §§ 1813(a)(1)(A), (a)(2) & (c)(2); *id.* § 1815(a)(1). Heaton's central claim, which the district

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[15] *See Greenwood Trust*, 971 F.2d at 826-27, 830; *Hill*, 799 F. Supp. at 951-52.

[16] *See* FDIC General Counsel's Opinion No. 12, *supra* note 3 (describing the legal considerations supporting the FDIC's "consistent practice," during a period of "more than 30 years," *id.* at 14,572, of treating state-chartered institutions similar to Monogram as "State banks" under the FDIA); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (holding that the FDIC's "longstanding policy" of excluding certain promissory notes from the definition of "deposit" in the FDIA should be given "considerable weight," even though that policy "ha[d] not been reduced to a specific regulation"); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that agency opinions that are not the product of a formal adjudication or a notice-and-comment rulemaking are still "entitled to respect" to the extent that they have the "power to persuade").

court accepted, was that Monogram was not "engaged in the business of receiving deposits" because it accepted deposits only from its parent company and not from the general public. *See* Pet. App. 2a, 5a. Thus, as a logical matter, Heaton's claim directly challenged Monogram's right to maintain its status as an insured bank under the FDIA.[17]

Under the FDIA, proceedings to terminate a bank's deposit insurance – *including* proceedings to terminate a bank's insured status for failure to engage in the "business of receiving deposits" – must be brought by the FDIC in accordance with prescribed statutory standards. 12 U.S.C. §§ 1818(a), (p) & (w). The FDIC has adopted detailed administrative procedures to implement the statutory requirements for deposit insurance terminations. *See* 12 C.F.R. §§ 308.119 - 308.124.

The district court improperly allowed Heaton to circumvent this congressionally established regime for deposit insurance terminations. As shown above, Heaton's lawsuit represented an unauthorized collateral attack on Monogram's eligibility to maintain its insured status. Given the FDIA's clear mandate, Heaton should have been required to file an administrative petition requesting the FDIC to determine whether Monogram's status as an insured "State bank" should be terminated under 12 U.S.C. § 1818(p).[18] In a closely similar case, this Court held that a private litigant could not sue in district court to attack a bank holding company acquisition that had received the approval of the Federal

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[17] *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,103 (confirming that any bank that fails to satisfy the "threshold statutory requirement" of being "engaged in the business of receiving deposits" would be "ineligible for deposit insurance").

[18] In fact, *amicus* CSBS recently followed this approach in petitioning the FDIC to adopt a regulation that would incorporate the legal interpretation of "State bank" set forth in FDIC General Counsel's Opinion No. 12. *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,105-06.

Reserve Board (the "Board"). This Court concluded, based on the provisions of the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.* ("BHCA"), that all challenges to bank holding company acquisitions must first be raised in administrative proceedings before the Board. *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 417-23 (1965). *Whitney* specifically rejected "the notion that the Board's determination [under the BHCA] may be collaterally attacked in District Court." This Court declared that the Board should be allowed to "make the determination of the plan's propriety in the first instance," because the Board's "vital role" in administering the BHCA "makes its views of particular benefit to the courts." *Id.* at 421-22. Thus, under *Whitney*, the district court should have dismissed Heaton's challenge to Monogram's status as an insured "State bank" and should have directed Heaton to exhaust her administrative remedies before the FDIC.[19]

Unless overturned, the district court's ruling could undermine the integrity and reliability of FDIC determinations regarding the insured status of state banks. By holding that Monogram's limited deposit-taking activities prevented it from qualifying as a "State bank" under the FDIA, the district court called into question the expert judgment of the FDIC as to the eligibility of similar state-chartered credit card banks and limited-purpose trust companies to receive deposit insurance. In *Meriden Trust*, the Second Circuit rejected a comparable attempt by a state bank

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[19] In *Whitney*, this Court pointed out that Congress had "enacted a specific statutory scheme for obtaining review" of Board determinations under the BHCA. The Court therefore held that "the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to." 379 U.S. at 422. Congress has similarly provided for statutory review (in federal district courts) of the FDIC's administrative decisions under the FDIA. *See* 12 U.S.C. §§ 1819(a)(Fourth) & (b)(2)(A). Accordingly, Heaton's right to obtain judicial review would not have been prejudiced in any way by a requirement that she exhaust her administrative remedies under the FDIA.

to challenge its continuing status as an insured "State bank." In that case, the plaintiff bank, like Heaton, filed suit after failing to follow the FDIA's prescribed statutory procedures for cancelling its deposit insurance. *See* 62 F.3d at 453 (citing 12 U.S.C. §§ 1818(a) & 1828(i)(3)). The Second Circuit concluded – in terms that are equally applicable to this case – that the integrity of the FDIC's regulatory authority would be seriously compromised if the status of banks could be changed "from 'insured' to 'noninsured' at will" through litigation conducted outside the boundaries of the FDIA's statutory scheme. *Id.*

3. The district court's ruling also threatens to disrupt the FDIA's dual system of state and federal regulation for state-chartered credit card banks and similar limited-purpose institutions (including trust companies) that qualify as "State banks" and obtain deposit insurance. Under the FDIA, insured "State banks" continue to operate under the primary supervision of their respective state banking commissioners.[20] However, the FDIA also provides for the examination and supervision of insured "State banks" by designated federal banking agencies.[21] This complementary layer of federal regulation is designed, *inter alia*, to maintain public confidence in FDIC-insured state banks and to preserve the solvency of the deposit insurance fund. *See, e.g., First State Bank of Hudson County v. United States*, 599 F.2d 558, 562-63 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The

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[20] *See, e.g.*, 12 U.S.C. § 1813(r)(1); *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 679 (5th Cir. 1979) (the FDIA recognizes that "State banks are chartered by the States, and are operated under State laws, and are responsible first and foremost to the officials of the States which created them").

[21] The Board is the responsible federal regulator for insured state banks that are members of the Federal Reserve System, while the FDIC is the responsible federal regulator for insured state nonmember banks. *See* 12 U.S.C. §§ 1813(q)(2) & (3). The responsible federal regulators have examination authority over insured state banks under 12 U.S.C. §§ 325 (state member banks) & 1820(b) (state nonmember banks).

FDIA's provisions, and federal regulations adopted thereunder, supplement state laws in important areas such as ensuring capital adequacy, preventing unsound banking practices, and restricting transactions with affiliates and loans to insiders.[22]

The FDIA thus preserves the primary supervisory authority of state bank regulators over "State banks" but also establishes a significant supporting role for federal agencies.[23] By declaring that Monogram was not a "State bank" under the FDIA, the district court necessarily indicated that the FDIA's entire supervisory regime was inapplicable to Monogram and similar state-chartered, limited-purpose banks.[24] Consequently, with respect to those banks, the district court's ruling could destroy the careful balance between state and federal regulation established by the FDIA .

State bank regulators rely on the FDIC's approval of deposit insurance as a strong indicator that each insured state bank will maintain a safe and sound operating condition. Indeed, some states require their regulators to revoke the charter of any state bank that fails to maintain its insured status.[25] The district court's ruling has created significant and undesirable confusion about the insured status of Monogram and similar limited-purpose state banks. Unless that ruling is overturned, many state bank regulators will have to consider whether they must adopt additional safety and soundness rules

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[22] *See, e.g.*, 12 U.S.C. §§ 1818 & 1828(j); 12 C.F.R. Parts 208 & 325.

[23] *See, e.g., In re Southern Industrial Banking Corp.*, 872 F.2d 1257, 1260 (6th Cir. 1989); *Investment Co. Institute v. FDIC*, 728 F.2d 518, 524-25 (D.C. Cir. 1984).

[24] *See* FDIC Notice of Proposed Rulemaking, *supra* note 3, at 20,104-05 (noting that, based on the district court's ruling, a state bank approved for deposit insurance by the FDIC could potentially claim the right to operate "free from the restrictions imposed by section 24" of the FDIA, 12 U.S.C. § 1831a, on the permissible activities of insured state banks).

[25] *See, e.g., id.* at 20,104 (citing Florida and Virginia statutes).

or seek new legislation to offset the threatened loss of supplemental federal regulation under the FDIA. Given the nationwide significance of the district court's decision, state authorities should not be required to contemplate far-reaching changes to their banking codes until the district court's misguided construction of the FDIA has received full appellate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 18, 2001

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